FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1829

GRIFFIN B. BELL, et al.,

Petitioners,

—VS.—

LOUIS WOLFISH, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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IN THE

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October Term, 1978

No. 77-1829

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GRIFFIN B. BELL, et al.,

Petitioners,

- vs -

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE

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Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939.

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* Letters of consent to the filing of this Brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and lower courts, and it has participated as amicus curiae in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving conditions in pre-trial detention facilities and discrimination against pre-trial detainees, including Taylor v. Sterrett, 344 F.Supp. 411 (N.D. Tex. 1972), aff'd, 499 F.2d 367 (5th Cir. 1974); Jones v. Wittenberg,

330 F.Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Inmates of the Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973); Collins v. Schoonfield, 344 F.Supp. 257 (D. Md. 1972); Hamilton v. Love, 328 F.Supp. 1182 (E.D. Ark. 1971). The Legal Defense Fund has a special interest in the rights of pre-trial detainees because blacks are disproportionally unable to post bail and are disporportionately represented both in local and federal pre-trial detention facilities.

SUMMARY OF ARGUMENT

This case presents questions of first impression in this Court affecting the conditions and practices in jails across this Nation. Restrictions imposed upon unconvicted citizens who, for the most part, are detained solely because they could not make bail, should not be upheld by blanket deference to the claims of local jailers that those restrictions are mandated by security needs. Rather, the cases of the past decade make clear that such restrictions are predominantly

rules of administrative convenience. The rules and practices at issue in this case are in the same category and should not be upheld.

Ruling on consitutitonal grounds, the courts below properly declined to defer to such "expertise" and enjoined those practices. However, the rulings below are also sustainable on non-constitutional grounds. The federal courts have inherent authority to correct the conditions under which persons who are awaiting trial in the federal courts, and who are still within the courts' jurisdiction, may be detained. In addition, the practices at issue in this case were properly enjoined since they violated the defendants' statutory duty to "provide suitable quarters" for pre-trial detainees.

ARGUMENT

POINT I

RESTRICTIONS IMPOSED UPON UNCONVICTED PRE-TRIAL DETAINEES SHOULD NOT BE UPHELD BY BLANKET DEFERENCE TO THE CLAIM OF LOCAL JAILERS THAT SUCH RESTRICTIONS ARE NECESSARY TO MAINTAIN JAIL SECURITY

A.

This case presents questions of first impression for this Court concerning the treatment of

unconvicted citizens in our Nation's jails. Although the jail at issue here is a new facility operated by the United States Bureau of Prisons, the decision in this case will affect the rights of thousands of pre-trial detainees in every county jail and local lock-up across the United States.

Gross inadequacies in the operation of our local jails have long been the subject of official criticism. Ten years ago, the President's Commission on Law Enforcement and the Administration of Justice stated:

> It is probably true that persons who have not yet been convicted of a crime are subjected to the worst aspects of the American correctional system. Unconvicted persons, as yet legally innocent, are almost invariably subjected to the tightest security . . .
>
> This primary concern for security imposes regimentation, repeated searches, and close surveillance on detainees.

The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 24 (1967). Five years later, the American Assembly concluded that

> Local jails are even worse than prisons.... In them standards of humanity and decency are violated, and the presumption of innocence which is so basic to American Justice is ignored.

Final Report of the 42nd American Assembly (1972), quoted in Inmates of the Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 684 (D. Mass. 1973).

The reasons why local jails are operated under such restrictive measures are not difficult to fathom. Jails are normally run by local administrations, the least solvent of all governmental bodies and the most susceptible to political pressures against unpopular expenditures.[1/] Accordingly, there is an inevitable "[a]cute shortage of resources" resulting in a "shortage of trained staff and lack of program in many detention facilities." Task Force Report: Corrections, supra, at 25. Local jails generally are not operated by highly trained correctional experts but by local sheriffs and police, "law enforcement officials [who are] limited to merely custodial functions." Id. at 23.

Nonetheless, petitioners herein would have this Court accord "substantial deference" to the "expertise" of local jailers in any matter

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1/ See, e.g., Rhem v. Malcolm, 507 F.2d 333, 342 (2d Cir. 1974).

claimed by them to be related to security. (Brief for Petitioners, p. 58.) This rule would, of course, apply not only to the United States Bureau of Prisons but to every sheriff and local warden throughout the United States. Granting such broad and unscrutinized authority to the keepers of our local jails would, we submit, be both unwarranted and unwise. As testified to by the cases that follow, the manner in which such authority has been wielded in recent years has proven to be anything but expert.

B.

The district court decisions of the past decade are replete with examples of pre-trial detention rules and practices that include the arbitrary, the self-protective, the convenient, and the purely bizzare. Many of these rules and practices have violated even the most basic constitutional rights. Nearly all have been justified by local jailers in the name of security. For example, in Manicone v. Corso, 365 F.Supp. 576 (E.D.N.Y. 1973), the sheriff had

decided to ban all newspapers from the jail. The security rationales proffered for this restriction were that newspapers might disrupt the prisoners, particularly when news of crimes or an inmate's case was reported, and that the accumulations of papers caused a fire hazard. Id. at 577. The district court did not defer to such expertise, but enjoined the practice, observing:

> The physical problems of fire control can be met by less restrictive means than total censorship. The incendiary nature of ideas and facts published in newspapers is sometimes bothersome to those in authority; under our Constitution, such inconvenience is unavoidable.

Id.

A similar practice fell to judicial scrutiny in Collins v. Schoonfield, 344 F.Supp. 257 (D. Md. 1972). There, the court enjoined the warden from censoring newspapers merely because they contained articles critical of his administration of the facility.

In Funchess v. Beame, No. 73 C 572 (E.D.N.Y. July 12, 1974), the warden of the Brooklyn House of Detention had prohibited detainees from receiving such supplies as legal size bond, onion

skin paper, carbon paper, manila folders and large legal envelopes. It was uncontradicted that the warden imposed this rule because, by his own admission, he objected to being named as a defendant in lawsuits brought by the detainees. The district court enjoined the practice. See also Taylor v. Sterrett, 344 F.Supp. 411, 422-423 (N.D. Tex. 1972), aff'd, 499 F.2d 367, 368 (5th Cir. 1974) (sheriff and other jail officials enjoined from destroying law books, legal materials and other legal documents).

Even in cases where the warden's motives may have been more well-meaning, extraordianay restrictions have been imposed upon pre-trial detainees. For example, in Bay County Jail Inmates v. Bay County Board of Commissioners, Civil Action No. 74-10056 (N.D. Mich., Aug. 29, 1974), an undersheriff had refused to send a letter of a suicidal detainee to a close relative because he feared that the letter "would disturb the recipient." Slip op. at 13. The district court invalidated such censorship.

Strict censorship of mail has, however, long been the rule in many local jails. And while

jailers have often sought to justify restrictions on correspondence as requisites of security, many such restrictions have been ultimately exposed as rules of purely administrative convenience. For example, in Inmates of Milwaukee County Jail v. Petersen, 353 F.Supp. 1157 (E.D. Wisc. 1973), detainees were limited to two pages per letter, and to one page if both sides of the paper were used. The "stated purpose" of the rule was "to discourage correspondence and to promote the convenience of the jail administration in censoring." Id. at 1164. Censorship included the deletion from outgoing mail, on "security" grounds, of notice to relatives and friends of the time and place of the detainee's next court appearance. Id. The district court ordered an end to such overbroad mail restrictions. Id. at 1167-68. Similarly, in Vest v. Lubbock County Commissioners, 444 F.Supp. 824 (N.D. Tex. 1977), detainees were limited to three pages per letter and six incoming and outgoing letters per week. The rule was concededly devised solely to reduce the amount of time needed for guards to read the mail; the guards were required to read all mail,

and could refuse to mail or deliver any letter containing language they deemed "abusive." Id. at 828-29.[2/]

Restrictive practices also have been revealed in cases dealing with visiting. In Manicone v. Cleary, No. 74 C 575 (E.D.N.Y. June 30, 1975), the warden had prohibited children from visiting their fathers on the ground that such visits would have a disturbing effect upon the children. The district court invalidated the rule, noting that

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2/ See also, e.g., Owens-El v. Robinson, 442 F.Supp. 1368, 1387 (W.D. Pa. 1978) (limit of one page per letter on all outgoing non-legal mail); Marion County Jail Inmates v. Broderick, No. IP 72-C-424 (S.D. Ind., March 24, 1976) (limit of one outgoing letter per day; each letter limited to one piece of paper; letters to be written only on stationary purchased from the jail's commissary); Barnes v. Government of the Virgin Islands, 415 F.Supp. 1218, 1234 (D. V.I. 1976) (limits on number and length of letters); Collins v. Schoonfield, supra, 344 F.Supp. at 276 (D. Md. 1972) (warden intercepted, failed to deliver, and photocopied correspondence of inmates with courts, attorneys and public officials as well as with family and friends); Conklin v. Hancock, 334 F.Supp. 1119, 1122 (D.N.H. 1971) (detainee's letters may not be held up merely because they are critical of the warden, since "critical or even insulting letters would not present a clear and present danger to prison security").

prolonged separation from a parent is also harmful to a child and that the decision to bring a child to the jail "is better made by the detainee and his family than by an arbitrary jail regulation." Slip. op. at 29.[3/]

Foremost among the concerns of local jailers, of course, is the fear that a detainee may try to escape. While that concern is obviously a legitimate one, some of the security restrictions imposed in this cause have bordered on the ludicrous. For example, in Owens-El v. Robinson, 442 F.Supp. 1367 (W.D. Pa. 1978), all detainees at the Allegheny County Jail in Pittsburgh had for several years been totally deprived of bed sheets, "for security reasons." 442 F.Supp. at 1377. The warden began distributing sheets just before the case went to trial, although the record revealed that they were still in short supply. Id. at 1378.

3/ Other jailers, in their "expertise," have found it necessary to keep children from their parents. The courts have disagreed, invalidating such practices. See, e.g., Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976); Goldsby v. Carnes, 429 F.Supp. 370, 378 (W.D. Mo. 1977), prior opinion, 365 F.Supp. 395, 415 (W.D. Mo. 1973)(consent order); O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582, 599 (E.D. Mich. 1977); Miller v. Carson, No. 74-382 Civ.J-5 at 15 (M.D. Fla. Jan. 31, 1975 (preliminary injunction), aff'd, 563 F.2d 741, 748 (5th Cir. 1977); Brenneman v. Madigan, 343 F.Supp. 128, 141 (N.D. Cal. 1972); Jones v. Wittenberg, 330 F.Supp. 707, 717 (N.D. Ohio 1971); Powlowski v. Wullich, 81 Misc.2d 895, 901 (Sup. Ct. Monroe County 1975). Other cases invalidating unreasonable restrictions on who may visit a detainee include: Brenneman, supra, (limit of five persons to each detainee's list of visitors); Marion County Jail, supra, at 7 (limit of three persons to each detainee's visiting list; limit of two visitors per week). Even visits by attorneys have been the subject of severe restrictions. See, e.g., Manicone v. Cleary, supra.

The district court required the warden to provide a clean change of linen weekly. Order of Jan. 4, 1967, ¶7.

In Bundy v. Katsaris, TCA 78-0913 (N.D. Fla. Nov. 1, 1978), a high escape-risk detainee, accorded outdoor recreation less than once a month on a 40 square foot rooftop surrounded by a ten-foot high fence topped with barbed wire, was nonetheless fitted during the recreation periods with chains about his waist and wrists, and with metal leg braces to prevent his knees from flexing. The overall effect was to render the de-

tainee "practically immobile." Slip. op. at 3. The district court, observing that the presense of guards should be sufficient to prevent escape from the fenced rooftop, ordered the leg braces and chains removed and required the warden to accord the detainee one hour of daily outdoor recreation. Id. at 12.

In O'Bryan v. County of Saginaw, 437 F.Supp. 582 (E.D. Mich. 1977), the warden deemed it necessary for security to prevent all detainees with bail of more than $5000 from attending religious services. The district court enjoined the practice as violative of the First and Fourteenth Amendment rights of the unconvicted persons. Id. at 600. See also Wilson v. Beame, 380 F.Supp. 1232 (E.D.N.Y. 1974) (detainees in administrative segregation denied access to religious services, even though the chapel was a secure area eleven flights above the ground and the presence of additional officers was sufficient to guard against escape).

Overzealousness in the name of security has also led to severe treatment of detaineees in need of medical attention. Thus, in Miller v. Carson,

401 F.Supp. 835, 878 (M.D. Fla. 1975), aff'd, 563 F.2d 741 (5th Cir. 1977), every detainee taken to the hospital was kept continuously chained to the hospital bed regardless of his ailment or the seriousness of the charges pending against him. Similarly, in Campbell v. McGruder, 416 F.Supp. 100, 104 (D.D.C. 1975), aff'd and remanded, 580 F.3d 521, 551 (D.C. Cir. 1978), handcuffs and leg irons were used to shackle some detainees to beds; the district court observed one inmate entering his third consecutive week under such restraint. And in Collins v. Schoonfield, supra, 344 F.Supp. at 278, detainees suffering epileptic seizures, delerium tremens and mental disorders, as well as those who had attempted suicide or were undergoing withdrawal from narcotic addition, were routinely shackled with iron and other metal restraints in the jail infirmary; several detainees bore scars on their wrists and legs as a result of such treatment.

C.

Centuries ago, Blackstone observed that during the "dubious interval" between arrest and conviction,

> a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only ...

4 W. Blackstone, Commentaries 300. But Blackstone also despaired that jailers would not heed this caution. Id.

At issue in this case are not the physical conditions of the new Metropolitan Correctional Center, but the manner in which that jail is operated to impose "needless fetters" upon unconvicted citizens. One district court prophetically observed that

> if a beautiful brand new jail were built, and operated the way the present jail is operated, there would be little improvement in the difficulties at first, and what improvement there was would very rapidly disappear.

Jones v. Wittenberg, 330 F.Supp. 707, 712 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). Here we have a "brand new jail," but one which is operated in an unduly restrictive manner. Detainees are crammed two to a cell, where they must urinate and defecate in the close physical presence of one another. They are forced to undergo humiliating body cavity searches, accompanied by sadistic and abusive remarks of the guards, even though less

intrusive security measures would suffice. They may not observe the searching of their cells, even though the officers have been known to mishandle their limited collection of personal property. They may not receive packages from home, even though many other correctional systems routinely permit receipt of such packages without incident. And, until the Bureau of Prisons abandoned for the most part the "publisher only" rule (Brief for Petitioners, p. 69), they could not receive books or magazines from home despite nearly a score of court decisions which have invalidated that retriction throughout the country without untoward results.4/

Petitioners ask this Court to approve these restrictions by blind deference to the fiat of jailers, in the name of "security." but "almost any deprivation can be explained or defended by the justification that it improves the security of a jail or prison." Feeley v. Sampson, 570 F.2d 364, 380 (1st Cir. 1978) (Coffin, C.J.,

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4/ The latter two practices are particularly onerous for impecunious detainees who often cannot afford to purchase items from the commissary or new books from publishers and bookstores.

dissenting). Especially where the restrictions in question have been successfully abandoned at numerous other facilities without adverse consequence, courts "should reject the unsubstantiated view of prison authorities that [a] privilege is a security risk." Id.[5/]

In fact, the practices enjoined in this case are no more necessary to security than those found to be unreasonable in the cases discussed above. This "necessity" results solely from the reluctance of the jailer to adopt procedures that are less convenient for him. Packages can be inspected before their contents are handed over to detainees. Visiting can be made secure by vigilent monitoring of the visit -- which already takes place in full view of institutional officials, United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 147 (S.D.N.Y. 1977) -- combined with careful searches of visitors and the extensive strip searches of the detainee approved by the district court. Id. at 148. These surely

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5/ Although Chief Judge Coffin's words were written in dissent, they reflect the view of a majority of the three active judges of the First Circuit. Circuit Judge Bownes was not a member of the Feeley panel because he had decided the case as a district judge.

suffice to render unnecessary routine use of dehumanizing anal, vaginal, and testicle searches. Cells can be examined respectfully yet thoroughly without barring the detainee from observing. And, as petitioners now concede, most publications can be safely allowed into the jail regardless of their source.[6/]

Nor should this Court be deterred by the notion that, although the restrictions enjoined below are undesirable, petitioners should not be required to abandon them as a matter of constitutional law. The history of jail reform efforts

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6/ The Bureau's reluctance until this late date to modify the "publishers only" rule with respect to paperback books is a prime example of undue emphasis upon administrative concerns. Obviously, a book can be carefully inspected before it is given to the detainee. It should come as no surprise that many of the jailers whose practices were enjoined in the cases cited above were also strong adherents to the "publishers only" rule, and that they abandoned that restriction only by court order. See Collins v. Schoonfield, supra, 344 F.Supp. at 281; Inmates of Milwaukee County Jail v. Peterson, supra, 353 F.Supp. at 1168-69; Funchess v. Beame, supra; Miller v. Carson, supra, Order and Preliminary Injunction at 15 (Jan. 31, 1975); Manicone v. Cleary, supra, Slip. op. at 44-48; Marion County Jail Inmates v. Broderisk, supra, Slip. op. at 7, 15; Owens-El v. Robinson, supra, 442 F.Supp. at 1487-88; O'Bryan v. County of Saginaw, Mich., supra, 437 F.Supp. at 600.

in recent years is replete with instances of unheeded administrative proposals, draft standards and grand jury reports. See, e.g., Jones v. Wittenberg, supra, 323 F.Supp. 93, 97 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854, 855-56 (6th Cir. 1972) (reports of several grand juries, professional groups and civic groups ignored); Inmates of the Suffolk County Jail v. Eisenstadt, supra, 360 F.Supp. at 681 (D. Mass. 1973) (seven separate governmental reports unimplemented for over a quarter of a century); Rhem v. Malcolm, 371 F.Supp. 594, 604, 607, 609, 616 (S.D.N.Y. 1974), aff'd, 507 F.2d 333 (2d Cir. 1974) (city failed to adopt numerous recommendations of its own Board of Correction and Environmental Protection Agency, and of State legislative committee); Benjamin v. Malcolm, 75 Civ. 3073 (S.D.N.Y. January 6, 1976), Slip. op. at 3 (major riot caused by overcrowding after city once again ignored warnings of Board of Correction; court ordered swift end to double celling). In this very case, we are told that the much-heralded Draft Federal Standards for Corrections, which support

respondents' position on nearly every issue,[7/] are merely "liberal administrative goals" which should not reflect upon the rationality or necessity of petitioner's restrictive practices. (Brief for Petitioners, p. 55 n.43.).

The practices condemned in this case are degrading, humiliating and totally unnecessary. In the case of unconvicted pretrial detainees, "the orphans of criminal jurisprudence," Inmates of the Suffolk County Jail v. Eisenstadt, supra, 360 F.Supp. at 688, that alone should be sufficient to render the practices unconstitutional. As this Court has held,

> a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims.... When a prison regulation or practice offends a fundamental consitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

Procunier v. Martinez, 416 U.S. 396, 405 (1974).

7/ See discussion, infra, n.17 & accompanying text & n.18.

ARGUMENT

POINT II

THE FEDERAL COURTS HAVE INHERENT POWER TO CORRECT THE CONDITIONS UNDER WHICH PERSONS AWAITING TRIAL IN THE FEDERAL COURTS ARE DETAINED

As noted above, the courts below properly declined to defer to the "expertise" of the warders of this Nation's jails. In doing so, they relied on constitutional principles. But the rulings below are equally well sustained on other, non-constitutional grounds.[8/] As the trial judge aptly noted United States ex rel. Wolfish v. United States, 428 F.Supp. 333, 340 (S.D.N.Y. 1977), the federal character of the Metropolitan

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8/ It is settled practice to avoid a decision of a constitutional issue if a case can be fairly decided on another ground.

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.

Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944), cited in University of California Regents v. Bakke, 438 U.S. ____, 57 L.Ed.2d 750, 847, 98 S. Ct. 2733, ____ (1978) (Opinion of Stevens, J.).

Correctional Center ("MCC") puts this case in a different posture than the many cases dealing with similar practices in state pre-trial detention facilities.[9/] Inmates at the MCC, which is actually connected to the courthouse, are, for the most part, confined there by order of federal district court judges.[10/] Thus, this case poses the "still surprising open" question:

9/ At the very least, the strong notions of federalism that are brought into play in cases where the federal courts are dealing with state prisons and pre-trial facilities, see, e.g., Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 126 (1977); Procunier v. Martinez, 416 U.S. 396, 405 (1974), are not relevant to this case.

10/ This distinguishes the instant case from prior cases dealing with practices in federal prisons. The statute specifically provides that: "A person convicted of an offense against the United States shall be committed ... to the custody of the Attorney General of the United States...." 18 U.S.C. §4082(a) (1976). Thus, when dealing with issues regarding the conditions of confinement of convicted persons, the courts properly display some measure of deference to the discretion of the executive branch of government. This case, however, involves pre-trial detainees. They are not consigned by statute to the custody of the Attorney General. Compare 18 U.S.C. §§4001(b)(1) & 4042(1) & (2) (1976) with §4082(a). They are there solely pursuant to the decisions of federal judges regarding commitment and admission to bail.

> whether a federal court, confronted by demands for fair treatment from "its own" inmates, may not in such a case shoulder greater responsibilities or, to put it less demurely, exercise greater powers.

United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 121 (S.D.N.Y. 1977). It is respectfully submitted that the federal courts do possess such inherent power to correct the conditions of confinement for persons whom those very same courts have detained. Such power extends beyond solely enforcing constitutional minima, but rather encompasses the power to correct unreasonable federal detention practices.

From the time that a person charged with a federal crime is first brought before a federal judicial officer, he is subject to the jurisdiction of the federal courts. See Miller v. United States, 6 F.2d 463 (3d Cir. 1925). Control over a defendant during the period between his first appearance and trial has long been held to be a concomitant of the court's power and authority over the case. Thus, it has been said that the power to admit to bail "is incident to the power to hear and determine or to commit," Berkowitz v. United States, 90 F.2d 881, 883 (8th Cir.

1937), and "inherent at the common law." Ewing v. United States, 240 F. 241, 248 (6th Cir. 1917) and cases cited therein. See also, Barth v. Clise, 79 U.S. (12 Wall.) 400, 402 (1871). Although the power to admit to bail was first conferred by the Judiciary Act of 1789, the courts have relied upon this residuum of inherent power in granting bail in cases falling in the interstices of statutes and rules, see Berkowitz, supra, and in cases where the statutes are wholly silent. When the issue was first raised in this Court seventy-five years ago with regard to the power of federal courts to grant bail to persons awaiting extradition, it stated:

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute....

Wright v. Henkel, 190 U.S. 40, 63 (1903). Later cases have so held. See, e.g., In re Gannon, 27 F.2d 362 (E.D. Pa. 1928). Similarly, the general weight of authority is that in habeas corpus proceedings federal courts have inherent power to grant bail. Johnston v. Marsh, 227 F.2d 528 (3rd Cir. 1955); Principe v. Ault, 62 F.Supp. 279 (N.D. Ohio 1945) (deportation) and cases cited therein. But see Bongiovanni v. Ward, 50 F.Supp. 3 (D.

Mass. 1943)(deportation). In habeas too, the court's power to admit to bail is based on

> the fact that there is a prisoner before him over whom he has jurisdiction and where his power to act judicially is expressly conferred by statute. That being so, he had the authority which a court has with regard to such a case.... In other words, a court has very wide authority over persons and business before it. [footnotes omitted].

Johnston, supra, 227 F.2d at 530.11/

11/ This notion of inherent power is not in conflict with the principle that the inferior federal courts are courts of limited jurisdiction. As noted by the court in Johnston:

> The statement is often made that the inferior courts of the United States are courts of limited jurisdiction. This is a truism in one sense. The courts are competent to act in such cases, and only such cases, as the Congress, pursuant to the Constitution, assigns to them. And unless constitutional provisions stand in the way, the assignment may be varied at the will of Congress. But within the area of activity assigned to them, Federal courts are courts of full stature, and we may rightly look to common law concepts and precedents to see the scope of the implied or "inherent" authority which the judicial office carries with it.

The inherent power of courts to act upon persons brought within their jurisdiction has been recognized in other contexts as well. The power of a court to admit a person to bail is not spent once a decision to admit or remand is made. The courts are further empowered to affect and control the behavior of the bailee, still within its

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11/ Cont'd.

Johnston v. Marsh, 227 F.2d 528, 530 (3rd Cir. 1955), citing In re Gannon, supra, 27 F.2d 362 (E.D. Pa. 1928). In Gannon, the court expressed it thus:

> The "judicial power" is conferred by the Constitution upon the courts of the United States. The framers of the Constitution were familiar with common-law concepts and the words and phrases employed by common-law lawyers. The words chosed are "courts" and "judicial power." Whatever else may be said of the jurisdictional authority (in the power sense) of the judiciary, the meaning of the words and phrases used must be sought for in the literature of what we call the common-law. Courts cannot function without the use of process....

Id. at 363.

Here, the district court was exercising only statutorily granted jurisdiction; it was sitting to hear a petition for a writ of habeas corpus. 28 U.S.C. §2241 (1976).

jurisdiction, by placing conditions on his bail. Today this is done pursuant to specific statutory authority. 18 U.S.C. §3146(a) (1976). However, as noted by one court of appeals in upholding the constitutionality of §3146, there is little doubt that

> the course of the common law in England and the development of the common law and statutory law in the United States demonstrate that the courts have the inherent power to place restrictive conditions upon the granting of bail.

United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971). And, by rule, this Court has recognized the existence of the courts' power over the individual during the pre-trial period even while detained. Fed. R.Crim.P. 46(g) provides that:

> The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating unnecessary detention.

Thus, it is well established that the courts have extensive authority, both statutory and inherent, over persons within their jurisdiction either awaiting trial or on writ of habeas corpus. This power is best typified by the power to admit to bail or to condition bail. But the power to admit to bail, if not the stepchild of the power

to commit (see Berkowitz, supra), is no more than the flip side of that power. Both the power to commit and the power to grant bail proceed from the authority of the court over the person within its jurisdiction; both powers are exercised for the same purpose:

> [T]he court must enforce the attendance of the prisoner in some way, and we see no difference (again in the power sense) between one form of compulsion and another. The only difference is, as we have said, that one form acts upon his body; the other upon his will.

In re Gannon, supra, 27 F.2d at 363. Both powers affect the defendant awaiting trial in the same way. Conditions at a detention facility are to the detainee what bail conditions are to those at liberty pending trial; both affect liberty of movement and quality of life. Thus, the power to commit a defendant, and to place conditions upon his confinement, must be equally broad and similarly based.

In sum, the district courts, having jurisdiction over the person of the accused, have the power inherent in that authority to control his disposition pending trial. They may admit him to bail; they may allow bail on conditions. They

may bail him during the daytime, remanding him into custody at night. See 18 U.S.C. §3146(a)(5) (1976). They may remand him into custody pending trial; they may commit him with conditions. Given that, it is, at the very least, anamolous to say that they cannot act to correct conditions of confinement that are intolerable or unduly restrictive.12/

Put another way, pre-trial detainees are in confinement pursuant to the process of the district court, pursuant to its specific order of commitment or its order of commitment if the defendant fails to make bail or observe its conditions. This Court has long recognized that federal courts have inherent authority to police those federal agents that act pursuant to its process. Thus, in Rea v. United States, 350 U.S. 214 (1956), this Court held that when a federal agent obtained a search warrant in violation of the requirements of Fed.R.Crim.P. 41, the district court had inherent authority to enjoin the agent from testifying in state court about the contraband he found pursuant to that warrant. The Court held that the federal agent, having committed an "abuse of process issued by a United States Commissioner ...," was subject to the "supervisory powers over federal law enforcement agencies." Id. at 216-217. Similarly, in Wise v. Henkel, 220 U.S. 556 (1911), this Court relied on a federal court's inherent authority to police the execution of its processes. There, a district attorney was ordered to return certain books and papers to the owners. These items had been seized in the course of an arrest made pursuant to

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12/ Any other conclusion would lead to results that could often be as undesirable as they are anamolous. Since federal judges have unquestioned power to dispose of defendants prior to trial in the various ways just enumerated in the text, a federal judge who found the conditions of pre-trial detention in his district intolerable could in effect regulate those conditions through his power to bail or commit. He could condition his commitment orders or, in the alternative, grant lower bail.

Recognizing the inherent power of the district courts to directly rule on the conditions of pre-trial detention as in a case like this one has the obvious advantages of manageability, uniformity of result, and reviewability.

a federal warrant. The district attorney refused and was jailed for contempt. His writ of habeas corpus was discharged; he appealed to the Supreme Court. This Court held that it had no jurisdiction to hear the appeal because, under §5 of the Judiciary Act of 1891, it only had jurisdiction to hear the appeal if it concerned a question "involving the construction or application of the Constitution of the United States." Here, it ruled, the district attorney's confinement was not as a result of the district court's ruling on a constitutional issue. Rather, the power of the district court to order the return of the items seized was

> wholly irrespective of whether there was a constitutional right to exact the return of the books and papers. That is to say, it was within the power of the court to take jurisdiction of the subject of the return, and pass upon it, as a result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court.

Id. at 558.13/

13/ As has been recently reemphasized, similar power is legislatively conferred. In United States v. New York Telephone Co., 434 U.S. 159 (1977), it was noted that:

Here too, the power of the district court to order the discontinuation of the intolerable practices at issue in this case is "wholly irrespective of whether there [is] a constitutional right to exact" such changes. Here, as in Wise, it was within the power of the district court to take jurisdiction over the detainees confined to the MCC pursuant to judicial process and pass on the "unreasonable exertion of authority" represented by the practices that it found to induce "threat, nausea, and degradation .... foul odors, social stigma, humiliation and denials of minimal privacy....," 428 F.Supp. at

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13/ Cont'd.

> This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.

Id. at 172. The Court futher noted that the Act is a "legislatively approved source of procedural instruments designed to achieve the 'rational ends of law....,'" and that the court may use such writs in aid of its jurisdiction "when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." Id. at 172-173. (citations omitted).

339 (double celling); to be "a vital source of tension and hostility ...," "a blunt oppression...," and a violation of even "minimal dignity ...," 439 F.Supp. at 149 (searches performed without the presence of the detainee); and to be "unpleasant, embarrassing, and humiliating ... plung[ing] the reaction to a level of deep degradation and submission ...," as well as ineffective. 439 F.Supp. at 146-147 (body cavity searches). More unreasonable exertions of authority by federal law enforcement personnel -- pre-trial detainees being in the immediate custody of the Bureau of Prisons acting for the Attorney General, 18 U.S.C §§4001 & 4042 (1976) -- in connection with the execution of the process of the court could hardly be imagined, nor the inherent authority of the district court to act more plainly put.

13/ Cont'd.

In New York Telephone, supra, the Court held that federal courts can compel third parties to aid in the implementation of the process previously issued by the court. Here, the question is only one of the court's power to restrain federal agents in the overzealous execution of the courts' commitment orders.

In the instant case, the authority of the court is more firmly based than in Wise. The class of petitioners in the suit before the district court are, for the most part, pre-trial detainees still within the jurisdict on and power of the United States District Court for the Southern District of New York. Since this action was commenced and maintained on a writ of habeas corpus, Wolfish v. Levi, 573 F.2d 118, 122 (2d Cir. 1978), the petitioners were also within the jurisdiction of the district court sitting to decide the petition. The authority this power over the body of the petitioner comprehends, includes more than just the power to release the prisoner or remand him, or to admit him to bail pending that decision. It also includes the power

> to dispose of the party "as law and justice require." [28 U.S.C. §2243 (1976)]. The Judge is not limited to a simple remand or discharge of the prisoner, but he may remand with directions that the prisoner's retained civil rights be respected....

Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944). Thus, the district court sitting as a habeas court could inquire into and redress claims concerning conditions of confinement. Johnson v.

Avery, 393 U.S 483 (1969); Williams v. Richardson, 481 F.2d 358 (8th Cir. 1973); Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972); Armstrong v. Cardwell, 457 F.2d 34 (6th Cir. 1972); Coffin, supra.[14/] And, it was not limited to dealing with only

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14/ But see Perez, v. Turner, 462 F.2d 1056 (10th Cir.1972), cert. denied, 410 U.S. 944 (1973). Perez presented a habeas challenge to the conditions of his confinement. The court held that it could not release a dangerous criminal because of the conditions of his confinement. See generally, Developments in the Law: Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970).

Several state courts, following Coffin's lead, have indicated that state habeas corpus procedures are available to challenge conditions of confinement. In re Riddle, 57 Cal.2d 848, 372 P.2d 316, 22 Cal.R. 472, cert. denied, 371 U.S. 914 (1962); In re Jones, 57 Cal.2d 860, 372 P.2d 310, 22 Cal.R. 478 (1962); Mehafey v. State, 87 Idaho 228, 392 P.2d 279 (1964); Lavier v. Kansas, 209 Kan. 442, 497 P.2d 265 (1972); Comm. ex rel. Bryant v. Hendricks, 144 Pa. 83, 280 A.2d 110 (1971); State ex rel. Cole v. Tahash, 269 Minn. 1, 129 N.W.2d 903 (1964); Rogers v. Warden, Nevada State Prison, 84 Nev. 534, 445 P.2d 28 (1968); People ex rel. Brown v. Johnson, 9 N.Y.2d 482, 215 N.Y.S.2d 44, 174 N.E.2d 725 (1961); Grinfell v. Gladden, 241 Ore. 190, 405 P.2d 532 (1965), cert. denied, 382 U.S. 988 (1966); Hughes v. Turner, 14 U.2d 128, 378 P.2d 888 (1963); State ex rel. Pingley v. Coiner, ____ W. Va. ____, 186 S.E.2d 220 (1972). Contra, Saia v. Warden of Conn. State Prison, 25 Conn.Sup. 549, 209 A.2d 520 (1964); State v. McCray, 267 Md. 111, 297 A.2d 265 (1972).

constitutional claims. Unlike a petition for a writ of habeas corpus made by a state prisoner, a petititon from a federal prisoner need not raise federal constitutional or statutory issues. Compare 28 U.S.C. §2254(a) with §2241 (C) (1) & (2) (1976). Thus, upon habeas from federal custody, the court may "dispose of the matter as law and justice require." 28 U.S.C. §2243 (1976).

Here, then, the authority of a federal criminal court, of a court acting upon a petition for a writ of habeas corpus, and of a court to police the execution of its processes forms a unique coalescence. Thus, for all these reasons, the inherent authority so clearly recognized by this Court in Wise, is, in this case, even more firmly based. As in Wise, "wholly irrespective" of the constitutional issue, the rulings of the courts below striking down "unreasonable exertion[s] of authority" should be affirmed.

POINT III

THE PRACTICES OF THE MCC AT ISSUE IN THIS CASE WERE PROPERLY ENJOINED SINCE THEY VIOLATED THE DEFENDANTS' STATUTORY DUTY TO "PROVIDE SUITABLE QUARTERS" FOR PRE-TRIAL DETAINEES

The Attorney General is charged with the management and control of all Federal correc-

tional and penal institutions and has an affirmative duty to "promulgate rules for the government thereof." 18 U.S.C. §4001(b)(1) (1976). Under his direction, the Bureau of Prisons is charged with the direct management of such institutions and with the duty to "provide suitable quarters ... for ... all persons charged with or convicted of offenses against the United States." 18 U.S.C. §4042(1) & (2) (1976). These duties provide sound statutory grounds for affirming the rulings below. The findings made by the district court judge amply support the conclusion that the conditions at and the practices of the MCC do not comport with the duty of the Bureau as the agent of the Attorney General to provide suitable quarters for pre-trial detainees.

Although all of the issues presented on this appeal were decided on constitutional grounds, the statutory issue was raised below. The district court discussed both the statutory duties noted above and the reviewability of the Bureau's decisions and practices generally under the Administrative Procedure Act under the "arbitrary and

capricious" standard of 5 U.S.C. §706 (1976). United States ex rel Wolfish v. Levi, 439 F.Supp. 114, 122-124 (S.D.N.Y. 1977). The district court further noted that: "What is 'arbitrary', 'capricious,' ... may at once, and indistinguishably, violate constitutional as well as statutory rights." Id. at 124. Accordingly, it only explicitly relied on statutory grounds on a few minor issues, not here on review, that the court of appeals characterized as "administrative matters ... committed to agency discretion." Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978). Thus, neither of the courts below discussed the possible statutory bases for the rulings now before this Court.

The court of appeals did not decide the question whether actions of the Bureau of Prisons are reviewable under the Administrative Procedure Act. Id. at 125.[15/] However, it is immaterial whether the statutory issue be reached by way of the APA; by way of implying a right from the

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15/ Indeed, there is contradictory authority on this issue. Compare Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975), with Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976).

statutes themselves, as suggested by the district court, 439 F.Supp. at 122 (citing J. I Case v. Borak, 377 U.S. 426 (1964); or by way of the court's responsibility, in ruling on the petition for a writ of habeas corpus, to look to the relevant statutory provision in order to "dispose of the matter as law and justice require." 28 U.S.C. §2243 (1976). Under any theory, then, the statutory issue must be reached, and it provides a sound basis for the rulings below.

Even if it is assumed, arguendo, that the determination of what are suitable quarters is itself consigned to the discretion of the Attorney General, Cf. Morgan v. Willingham, 424 F.2d 200, 201 (10th Cir. 1970) (convicted prisoners),[16] the court's rulings would still be sustainable on statutory grounds.

Under the direction of the Attorney General, a Department of Justice Task Force has prepared a set of Draft Federal Standards for Corrections. These standards represent the result of a year long process participated in by representatives

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16/ But see discussion, supra, n.10.

of the Bureau, the LEAA, and other divisions of the Justice Department. The preface to the standards declares that they "provide guidelines for the decent and humane operation of our country's corrections and detention facilities..." and that:

> [I]t is the intention of the Department of Justice to use these standards as a basis for evaluating its own correctional programs and policies ... [and] to ask the Director of the Bureau of Prisons to submit a plan, which delineates each standard that is not currently met, the resources and steps which will be necessary to meet it, and a reasonable timetable for its accomplishment.

Federal Standards for Corrections [Draft], U.S. Department of Justice at 2. These standards specifically prohibit the practices at issue in this case: double-celling, routine body cavity searches, the publisher only rule, and the ban on packages.[17]

17/ The relevant sections provide:

PHYSICAL PLANT

002 All cells and detention rooms rated for single occupancy house only one inmate. [emphasis added].

If these standards had been adopted, there would be little doubt that the Attorney General

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17/ Cont'd.

> 004 Single rooms or cells have at least 60 square feet of floor space. Where inmates spend more than 10 hours per day in the room or cell, there is at least 70 square feet of floor space in detention facilities .... [emphasis in original].
>
> 005 Multiple occupancy cells house no more than 16 inmates, with a minimum of 60 square feet of floor space per inmate in the sleeping area (excluding activity spaces). [emphasis added].
>
> SECURITY AND CONTROL
>
> 013 ...Whenever body searches are required, staff personnel avoid unnecessary force and strive to preserve the dignity and integrity of the inmate.
>
> Discussion: The facility's search plans and procedures should include:
>
> ....
>
> Equally important, the search plan should include:

should be bound by them. Cf. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Even when agency

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17/ Cont'd.

> Use of nonintrusive sensors and other techniques instead of body searches whenever feasible;
>
> Manual or instrument inspection of body cavities only where there is probable cause and where authorized by the chief executive officer, conducted by a medically trained person;
>
> Visual inspection of body cavities, only where there is real suspicion, conducted by trained staff in an area within the facility designed to assure the greatest possible privacy to the inmate. Real suspicion may be created ... by the surrounding circumstances -- for example, ... any re-entry into general population in a secure facility from a visiting room where there is contact visiting that is not constantly monitored ... [emphasis added]
>
> MAIL AND VISITING
>
> 002 There is no limit on the volume of mail an inmate may send or receive, or on the length, language, content or source of such mail or publica-

determinations are not yet made official regulations but are intended to be binding on subsidiary agencies they may be enforced by the courts. See Thorpe v. Housing Authority of

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17/ Cont'd.

> tions, except where there is clear and convincing evidence to justify such limitations. [emphasis added].
>
> Discussion: Inmates may receive books and other publications from sources other than publishers. Such correspondence, as well as other packages, are subject to all searches and inspection requirements. [emphasis added].

Draft Standards at 10, 36-37, 63.

The double bunking of pre-trial detainees in rooms of 75 square feet designed for one, obviously violates the above quoted standards. Similarly, the standards specifically reject the publisher only rule and envision the receipt of packages. The conduct of routine body cavity searches after visits where "the inmates and their visitors are in full view during the visits and fully clad...," United States ex rel. Wolfish, v. Levi, 439 F.Supp. 114, 147 (S.D.N.Y. 1977), would also violate the above standards. It should be noted that the court of appeals upheld the MCC regulation requiring inmates to wear govern-

Durham, 393 U.S. 268 (1969). Awaiting adoption,[18] these standards still express the

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17/ Cont'd.

ment issued jumpsuits. Wolfish v. Levi, 573 F.2d 118, 132-133 (2d Cir. 1978). In McGoff v. Rapone, 78 F.R.D. 8 (E.D. Pa. 1978), the court, based on expert testimony, found that the use of jumpsuits "would reduce greatly the chance of prisoners carrying weapons ... as well as facilitate the detection of contraband." Id. at 17. There is testimony in the record in this case that the use of jumpsuits makes it difficult if not impossible to secrete contraband in the anus. (App. 45).

18/ In all candor, it should be noted that the pendency of this appeal is probably related to the delay in the adoption of these standards. It has been reported that:

> Justice Depatment official are being curiously mute about the current status of the correctional standards they proposed last spring....
>
> One complicating factor is that the department is defending itself in a law suit (Bell v. Wolfish) against the federal Metropolitan Correctional Center in New York City. In a writ for appeal of federal Judge Marvin Frankel's decision in that case the department seemed to argue against some of the very requirements included in its own draft standards.

considered opinion of the Attorney General and his staff, after a year of study, on exactly what are "suitable quarters" for convicted prisoners and pre-trial detainees. Thus, even if the determination of what are suitable quarters were wholly within the discretion of the Attorney General, he has already expressed his expert determination. No more extensive or considered procedure is in the offing. In Gulf States Utilities v. Federal Power Commission, 411 U.S. 747 (1973), the Court remanded for reconsideration the Federal Power Commission's decision to allow a public utility to issue certain bonds. The Court held that in exercising its expertise in ruling that the bond issue was in "the public interest" under §204 of the Federal Power Act, 16 U.S.C. §824c (1976), the FPC was required to consider the "fundamental national economic policy" expressed in another statute, the antitrust laws. Id. at 759. Here, in considering the exercise of the Attorney General's discretion and expertise in determining what are "suitable quarters," the Court need only look to the Attorney General's own expressions and determinations.

18/ Cont'd.

Criminal Justice Newsletter, Vol. 9, No. 23, at 4 (Nov. 20, 1978).

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

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